

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

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UNITED STATES OF AMERICA,

Plaintiff,

vs.

CURTIS CARAWAY,

Defendant.

2:09-cr-115-RLH-PAL

ORDER

(Motion for Certificate of Appealability—#94)

Defendant has filed a Motion for Certificate of Appealability (#94, filed May 25, 2012), to permit him to appeal this Court's denial of his §2255 motion to vacate the resentencing mandated by the Circuit Court.

Defendant Caraway was convicted, in September 2009 of one count of being a felon in possession of a firearm, one count of attempted interference with commerce by robbery, and one count of possession of a firearm during a crime of violence. On February 2, 2010, the Court imposed a concurrent sentence of 88 months of imprisonment for counts one and two and a consecutive sentence of 84 months of imprisonment for count three. During sentencing, the Court applied a two-level enhancement under U.S.S.G. §3C1.2, for reckless endangerment during flight, and a six-level enhancement under §3A1.2(c)(1) for the same conduct.

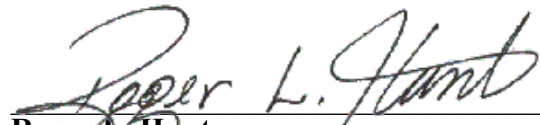
Defendant appealed his sentenced, which the Ninth Circuit Court of Appeals vacated and remanded for resentencing without the two-level enhancement. On December 17, 2010, the Court resentenced Caraway as ordered by the Ninth Circuit, removing the two-level enhancement.

1 Defendant did not appeal this new sentence. Rather he filed a motion to vacate his new sentence
2 under 28 U.S.C. §2255, arguing that the Court should have removed the six-level enhancement rather
3 than the two-level enhancement, as ordered by the Circuit Court. Because §2255 will generally not be
4 allowed to substitute for an appeal (*Cf. Reed v. Farley*, 512 U.S. 339, 354 (1994)), and the
5 resentencing was done at the specific direction of the Circuit Court, the §2255 motion was denied.

6 Having failed to properly appeal the resentencing in the first instance, but rather
7 choosing to attack the sentencing via §2255, so he could appeal that adverse ruling, he now seeks a
8 certificate of appealability. The Court refuses. Defendant has not shown any denial of a constitutional
9 right and reasonable jurists would not find his claims debatable.

10 IT IS THEREFORE ORDERED that the issuance of a Certificate of Appealability is
11 denied.

12 Dated: May 29, 2012.

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15 **Roger L. Hunt**
16 **United States District Judge**
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